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Asbestos litigation reform momentum builds in US

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Asbestos litigation in the US is now over 40 years old, yet continues to cost defendant companies and insurers billions of dollars each year. The litigation marches on because asbestos use was so widespread, and because of the resiliency and creativity of personal injury lawyers working on a contingent fee basis. There have also been litigation abuses.

The good news is that when a litigation abuse has become prominent, courts and legislatures have taken corrective action. For example, from the late 1990s until around 2006, the vast majority of asbestos lawsuits in the US were filed by unimpaired plaintiffs diagnosed through lawyer-arranged mass screenings. In response, courts and state legislatures set aside or dismissed claims of the physically unimpaired until actual injury could be shown. These reforms greatly diminished the economic incentive for plaintiffs' lawyers to bring claims on behalf of the non-sick. We are now in a new era of reform that focuses on transparency regarding plaintiffs' asbestos bankruptcy trust claims.

To date, over 100 companies with asbestos-related liabilities have filed bankruptcy, including most of the primary historical defendants in the litigation (i.e.,

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manufacturers of asbestos-containing thermal insulation). The US Bankruptcy Code provides a mechanism for such companies to channel their asbestos liabilities into trusts and emerge from bankruptcy with immunity from asbestos-related tort claims. According to a report by the US Government Accountability Office, over 60 trusts – which collectively held $36.8bn as of 2011 – have been established.

In addition, plaintiffs may file personal injury lawsuits against still-solvent companies. Many of these companies used to be peripheral or are newer defendants in the asbestos litigation. The Towers Watson consulting firm has identified more than 10,000 companies, including subsidiaries, named as asbestos defendants.

Thus, asbestos plaintiffs today have two independent avenues of recovery – the asbestos bankruptcy trust system and the civil court system.

By delaying the filing of trust filings until after a personal injury case is resolved, plaintiffs are able to suppress evidence of trust-related exposures that could be used to apportion fault to the bankrupt company in the tort case. Plaintiffs are also able to 'double dip', receiving a settlement or judgment in an asbestos-related personal injury lawsuit then receiving additional payments from multiple trusts for the same injury. In the recent Garlock Sealing Technologies, LLC bankruptcy case, for example, a typical mesothelioma plaintiff's total recovery was estimated to be $1m to $1.5m, including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts.

The pervasiveness of this tactic was recently exposed in the Garlock bankruptcy. Garlock presented the judge with evidence that plaintiffs' lawyers systematically withheld key evidence regarding trust-related thermal insulation exposures in order to increase their tort recoveries from Garlock, a gasket and packing manufacturer. For example, in a California case that Garlock settled for $450,000, a former sailor denied that he ever saw anyone installing or removing pipe insulation on his ship. After the plaintiff settled with Garlock, however, the plaintiff's lawyers filed 11 trust claims on his behalf, seven of which were based on declarations that the plaintiff "personally removed and replaced insulation and identified, by name, the insulation products to which he was exposed", according to the court. The judge in Garlock bluntly described Garlock's tort litigation as infected by a "startling pattern of misrepresentation" that unfairly inflated plaintiffs' recoveries against Garlock following the surge of asbestos bankruptcies by insulation defendants in the early 2000s.

A November 2015 analysis of the publicly available discovery data from Garlock's bankruptcy case in relation to asbestos defendant Crane Co. showed a similar pattern of abuse by plaintiffs and their lawyers. The study examined 1844 mesothelioma lawsuits resolved by Crane Co. from 2007 to 2011 that could reliably be matched to the Garlock data. The data revealed that, on average, plaintiffs filed 18 trust claim forms in cases where Crane was a co-defendant with Garlock, and 80 percent of these claim forms or related exposures were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings. A December 2015 US Chamber Institute for Legal Reform report detailed additional case examples from the Garlock discovery data and further exposed inconsistent allegations by plaintiffs between the tort and trust systems.

These revelations of systemic manipulation of the civil justice system have shocked the legal community and received widespread attention from sources as varied as the Wall Street Journal, National Public Radio and Huffington Post. In the New York Times, a columnist explained that trust

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claim manipulation and abuse is not victimless. In addition to harming defendant companies, their employees and insurers, personal injury lawyers are depleting assets needed by future asbestos claimants.

Momentum is building for reform. In Congress, the Furthering Asbestos Claims Transparency (FACT) Act, which was included in the Fairness in Class Action Litigation Act, passed out of the US House of Representatives in January 2016. The legislation requires asbestos trusts to file quarterly reports that will be available on the bankruptcy court's public docket. The reports would describe each claimant's name, exposure history, and basis for any payment from the trust, so that if a person denies trust-related exposures in an asbestos personal injury case, but later claims such exposures to recover from asbestos trusts, the inconsistent claiming activity will be disclosed. The legislation is now before a US Senate Committee.

At the state level, a number of states have enacted laws that provide a mechanism to require plaintiffs to file all asbestos trust claims before trial, so that the plaintiff cannot deny or downplay trust-related exposures in an asbestos personal injury case to obtain a large recovery from still-solvent companies, and then give a different exposure history to various trusts to try to bolster that person's trust recoveries. Juries will be more fully informed about the totality of a plaintiff's asbestos exposures so they can properly apportion fault between solvent defendants and bankrupt companies. In 2015, Texas, Arizona and West Virginia joined Ohio, Oklahoma and Wisconsin as states that have enacted asbestos bankruptcy trust transparency laws.

The goal of civil litigation is to resolve disputes in just and appropriate ways, not to allow personal injury lawyers to manipulate procedures for their own gain. We expect that momentum will continue to build and that more reforms will be enacted to stop the courts from being gamed by the asbestos personal injury bar. ■